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# Book Review: Court-Packing and Legal Creation - Symposium: History and Meaning of the Constitution

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## BOOK REVIEW

### COURT-PACKING AND LEGAL CREATION

*Review of FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL.* By James F. Simon. New York: Simon & Schuster. 2012. Pp. 461. \$28.00.

SHELDON GELMAN\*

#### ABSTRACT

James Simon's book reflects an important turn in the historical debate about New Deal-era constitutional change and the Court-packing plan.

This debate itself has a history. In its classic form, "externalists" argued that Justice Roberts and Chief Justice Hughes performed a constitutional turn-about in 1937 because of external political pressure on the Court. "Internalists" claimed that ordinary process of legal evolution, not political pressure, produced constitutional change.

Starting in the 1980s, accounts appeared that combined externalist history with non-externalist conclusions. Bruce Ackerman argued that the "political" had become the "legal" during the mid '30s. Daniel Farber acknowledged the effects of the Court-packing plan, but concluded that the causes of constitutional change had been legal as much as political. More recently, a book by Burt Solomon in 2009 demonstrated that political pressure produced a doctrinal conversion in Justice Roberts—but Solomon also argued that Roberts' conversion was genuine. A definitive account by Jeff Shesol in 2012 linked constitutional change to political pressure on the Court. Yet Shesol went on to conclude no one really could know "what sways a judge"—thereby ruling out externalist conclusions about 1937.

From the late 1930s until the 1980s New Deal-era constitutional changes had appeared legally unassailable. During the '80s, however, a narrower view of federal power and a different conception of the role of courts emerged to challenge New Deal conceptions. Not coincidentally, a conceptual distinction between law and politics—having faded during the 1930s—began to revive in legal thinking.

Because of these developments, externalist accounts suddenly posed a legal threat to the New Deal-era changes. Externalist histories had distinguished law from politics—but because the law-politics distinction lacked any resonance in law, externalist conclusions seemingly made no legal difference. Leading externalists—like internalists—favored the New

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Deal-era changes. With a revived law-politics distinction, however, externalism undermined New Deal-era legal change by portraying its origins as political, not as an outgrowth of law. From that point forward, proponents of New Deal-era change could embrace externalism only if they were willing to undermine the foundations of the New Deal.

For this reason, precisely when the law-politics distinction revived in *law*, it lost ground in *history*. Moreover, externalist accounts of events are in fact accurate—so externalism could not simply be jettisoned. To achieve both historical accuracy and legal acceptability, writers had to combine externalist accounts with non-externalist conclusions. And that is what happened.

Simon goes farther, however. Other accounts treat the law-politics distinction as false or overstated, but Simon pays it no heed at all—not even to criticize it. Instead, the difference between law and politics simply vanishes in the course of the book. Simon portrays Roosevelt and Hughes as larger-than-life figures whose apparent conflict in 1937 produced a new legal world. The elements of an ordinary history are discernible. However, Simon reshapes—and sometimes inverts—them to create a near-allegorical account of Roosevelt and Hughes. Simon argues that Hughes always favored an expansive conception of federal power, for example, even though Simon recounts the cases that demonstrate the opposite. In general, Simon credits Hughes with spearheading the constitutional revolution of 1937, a conclusion contrary to Simon's own evidence.

Simon went farther than others, I suggest, because the imperative of defending the New Deal-era in law has become more urgent. In addition, as both a lawyer and an historian, Simon perhaps felt the need to create a defense more strongly than other writers did. The result, however, resembles a creation myth: *FDR and Chief Justice Hughes* attempts to justify, and not really to describe, the process by which a new legal world emerged during the New Deal. In doing this, Simon reveals more about our current constitutional circumstances than about the events of the 1930s.

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# I. INTRODUCTION

President Franklin Roosevelt’s 1937 proposal to pack the Supreme Court recently passed its seventy-fifth anniversary. Clustered around the milestone, three books about the Court-packing plan, the decisions that triggered it, and its failure to gain Congressional approval have appeared in the last half-decade. What lies behind this revival of interest, however, is not the number of years that have elapsed. Instead, the question of why constitutional law changed dramatically seventy-five years ago has acquired new importance for constitutional law today.

James Simon’s *FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle over the New Deal* is the most recent of these studies, and the only one written by a lawyer. Like the other two—Jeff Shesol’s *Supreme Power: Franklin Roosevelt vs. the Supreme Court* and Burt Solomon’s *FDR v. The Constitution: The Court-Packing Fight and the Triumph of Democracy*<sup>1</sup>—it artfully describes events. All three authors posit the birth of a new legal world in 1937, a world in which the Constitution (this is a big change—want to make sure author didn’t want to say S.C.) no longer overrides legislative judgments about social and economic issues in the name of constitutional law—and, perhaps paradoxically—a world in which judge-made constitutional law no longer appears wholly unrelated to political judgments.

Like all origin stories, these accounts resonate with the present. It is natural to suppose that acts of creation influence the character, and, perhaps even fix the content, of whatever gets created. The year 1937 was, in effect, the “Big Bang” of modern constitutional law.

Yet historical investigation has added little to what contemporaries learned from reading their newspapers.<sup>2</sup> Before the 1936-37 term, the Supreme Court had consistently invalidated New Deal measures. The majority relied on restrictive interpretations of the Commerce and Tax and Spend clauses and a *Lochner*-like view of substantive due process. In these decisions Justice Owen Roberts joined four resolutely conservative Justices. With the notable exception of a 1936 state minimum wage case,<sup>3</sup> Chief Justice Charles Evans Hughes did so as well. But Hughes, Roberts and the Court seemingly reversed direction after Roosevelt’s 1936 landslide reelection and his announcement, in February 1937, of a plan to add six additional Justices to the Supreme Court. Performing a doctrinal about-face, the Court then upheld legislation in 1937—and thereafter—against the very same constitutional objections that earlier had proved fatal.

Contemporaries had little doubt about what happened. According to Shesol, “virtually everyone on both sides of the fight believed . . . that . . . seeking to save

<sup>1</sup> JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010); BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* (Walker & Co., 2009).

<sup>2</sup> A helpful timeline appears in Daniel A. Farber, *Who Killed Lochner?*, 90 GEO. L.J. 985, 996-99 (2002) (reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)).

<sup>3</sup> *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

itself from being packed, [the Supreme Court] had simply surrendered.”<sup>4</sup> “Virtually everyone” included President Roosevelt, Robert Jackson, Justice Stone, Felix Frankfurter, most newspapers, and the supporters of the Court-packing plan in Congress. (this prior sentence doesn’t make sense to me- included these people in what?) Even leaders of the opposition to Court-packing agreed.<sup>5</sup>

Despite the broad contemporary consensus, a long-running historical debate arose about the roles of law and politics in 1937. According to one view, the new constitutional era was thoroughly legal, both in its origins and in its essential character. According to the opposing view, the new era emerged from politics.

In the debate’s classic form, “externalists” claim that Roberts and Hughes “switched” because of the external political pressure on the Justices, while “internalists” argue that ordinary legal evolution produced constitutional change.<sup>6</sup> During the 1980s, hybrid theories appeared that combined elements of both views. Bruce Ackerman likened political events of the 1930s to a prolonged constitutional convention, and argued that the constitutional results—like the outcome of a constitutional convention—qualified as “legal.”<sup>7</sup> In effect, Ackerman separated the process of creation, which he considered political, from the nature of what was created—which Ackerman considered legal. Daniel Farber then offered what he described as a “version of the story” with “both internalist and externalist elements.” In particular, Farber acknowledged “possible short-term effect of the Court-packing plan” on Roberts and the longer-term effect of President Hoover, a “political actor,” appointing liberal Justices like Cardozo and Stone in the 1920s—Justices who went on to vote for constitutional change in 1937. Yet Farber considered “the New Deal’s political triumph . . . only one contributing factor” and attached great significance to the fact that “important legal elites, inside and outside the Court” had begun “abandon[ing]” old constitutional doctrines before Roosevelt’s reelection.<sup>8</sup> Taking a different approach to combining internalism and externalism, Laura Kalman suggested that *both* might prove accurate. Externalism, she observed, “may indeed account for the Justices’ actions.”<sup>9</sup> Yet Kalman also thought that Barry Cushman, a leading internalist, had “made a convincing case that [externalism] . . . is not the only explanation.”<sup>10</sup>

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<sup>4</sup> SHESOL, *supra* note 1, at 434.

<sup>5</sup> For discussion, see Sheldon Gelman, *The Court-packing Controversy*, 28 CONST. COMMENT. 451, 465-67 (2013) (reviewing SHESOL, *supra* note 1) (summarizing Shesol’s account); *But see* Barry Cushman, *The Man on the Flying Trapeze*, U. PA. J. CONST. L. 183 (2012) (reviewing SHESOL, *supra* note 1) (arguing that Roberts and Hughes did not dramatically change their views and noting some contemporary commentators and lower courts that reached the same conclusion).

<sup>6</sup> For an overview of this debate at the turn of the century, see Laura Kalman, *Law, Politics and the New Deal(s)*, 108 YALE L.J. 2165 (1999).

<sup>7</sup> Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989).

<sup>8</sup> Farber, *supra* note 2, at 1006. Focusing on substantive due process, Farber wrote that elites were “abandon[ing] . . . *Lochner*.” *Id.*

<sup>9</sup> Kalman, *supra* note 6, at 2190.

<sup>10</sup> *Id.*

Barry Cushman, the internalist cited by Kalman, cited two distinct problems with externalism. “[G]ood reason” existed, Cushman wrote, “to doubt that [externalism] . . . offers an *accurate* account.” That aside, externalism was “not a *complete* account” because it “neglect[ed] serious exploration of the internal [that is, legal and doctrinal] dimensions of the phenomenon.”<sup>11</sup> Thus, even if externalism proved “accurate,” internalism seemingly would remain viable and necessary. The same could not be said for externalism, however, if *internalism* proved accurate. Yet Cushman did not explain how an internalist account could remain viable if Hughes and Roberts in fact executed a politically-induced about-face.

Reviewing Cushman’s work, Mark Tushnet suggested that historians embraced either internalism or externalism depending on the view *in their own era* of the relationship between law and politics.<sup>12</sup> Tushnet wrote:

The New Deal constitutional revolution consisted of establishing that the Constitution provided no basis for distinguishing between the domains of law and politics. . . . New Deal jurisprudence provided the tools for demonstrating that all wise policies were constitutional. The success of the New Deal constitutional revolution in turn established that externalist accounts of constitutional development were correct. . . . In short, externalist accounts of the New Deal constitutional revolution fit comfortably into the intellectual universe that the New Deal itself created.<sup>13</sup>

Today, however, the:

New Deal era . . . has ended. . . . That we are in an era of transition seems undeniable, but we do not know, I believe, what the new constitutional order will look like. At the least, however, it is no longer so obviously true that there is no distinction between law and politics. That alone makes it possible to offer internalist accounts in which doctrinal development occurs in large measure because judges work out the logic of their principles.<sup>14</sup>

If we can explain historical accounts of 1937 by examining the legal culture that produced them, I believe we also do the reverse—that is, we can gain insight to our legal culture by seeing how it depicts 1937. Comparing our image of 1937 with what actually happened, we can discover something about the lens used to produce the image. That lens is our present-day legal culture.

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<sup>11</sup> BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 5 (Oxford Univ. Press, 1998) (emphasis in original).

<sup>12</sup> Mark Tushnet, *The New Deal Constitutional Revolution: Law, Politics, or What?*, 66 U. CHI. L. REV. 1061, 1078-79 (1999) (reviewing CUSHMAN, *supra* note 11).

<sup>13</sup> *Id.* at 1078.

<sup>14</sup> *Id.* at 1078-79. A developed version of this argument obviously would require qualifications. Internalist and externalist accounts may exist at the same time, for example. Nor do externalists necessarily suppose that in 1937 Justice Roberts deemed federal regulation of manufacturing, for example, to be “wise” and therefore “constitutional.” To the contrary, he may have voted to uphold those regulations because of political pressure, even though he personally considered them unwise.

Simon's, Shesol's and Solomon's accounts in fact share a fundamental quality: each mitigates, overrides or blurs the distinction between law and politics. Shesol explicitly argues that it is impossible to separate law from politics in judicial decisions. And Solomon offers a simultaneously externalist and an internalist account of 1937. Solomon argues both that political pressure prompted Roberts' doctrinal conversion and that the doctrinal conversion was genuine. Thus, Solomon thinks that events qualify as both legal and political.

Simon attempts something more radical. In his account, Hughes' and Roosevelt's differences—and along with them, the very difference between law and politics—vanished in 1937. Joining together politically, Hughes and Roosevelt created a world in which law and politics became inseparable.

To produce this allegory-like account, Simon relies on analyses that sometimes conflict with the facts and sometimes lead to internal inconsistencies. Basic facts—dates, actors, court holdings, who said what—Simon portrays accurately, even elegantly. In Simon's version, however, Hughes did not switch doctrinally – and so the question of whether he switched for political reasons never arises. Instead, Hughes *led* the constitutional revolution by steering the Court towards his own long-held, expansive conception of federal power—a conception supposedly identical to Roosevelt's.

Yet Hughes did switch in 1937, adopting a view of federal power directly opposite to one he had espoused in 1935 and 1936. Indeed, Hughes himself *introduced* into constitutional law the distinction between direct and indirect effects on interstate commerce that drove the Court's invalidation of New Deal measures. While noting that Hughes employed the distinction in 1935, Simon also credits Hughes with *abolishing* the same distinction in a 1914 decision, during his first stint on the Court. These and similar anomalies in Simon's account—for example, Simon argues that Hughes prevented the Court from fracturing during the 1930s when his own description makes it clear that the Court *was* fractured—do not reflect lack of knowledge or carelessness on Simon's part. Instead, they arise from an overarching narrative logic, one that—like Shesol's and Solomon's—seems calculated to save the New Deal constitutional revolution from present-day threats.

The New Deal may have undermined the law-politics distinction in *law*, but until the 1980s, the same distinction animated historical and political analyses of the New Deal. Assuming its validity, historians asked whether constitutional law became infused with politics in 1937. Both internalists and externalists regarded that question as well-formed; indeed, it was precisely what they disagreed about. During the 1980s, however—exactly when a revived law-politics distinction emerged in law—supporters of New Deal-era constitutional changes moved to blur the law-politics distinction in historical analysis. Thus, Simon, Shesol and Solomon—and to some degree Ackerman, Farber and Kalman—all portray the internalism-externalism debate as false or overstated. This, I argue, was not a coincidence.

How does New Deal-era constitutional change benefit from abolishing the law-politics distinction in historical analysis? If the birth of the New Deal era was political, it becomes vulnerable as a legal matter when judges and courts again distinguish law from politics. But, as Tushnet noted, precisely that has happened—the law-politics distinction is being revived in constitutional law. As a result, conceptions of federal power, substantive due process, and the judicial role dating from 1937 appear threatened. Recent decisions interpreting Commerce Clause afford a prime example.

Externalists could describe the constitutional revolution of 1937 as political in nature without weakening its legal foundations—but only because the law failed to distinguish between law and politics. In externalists' historical accounts, law and politics were as different as black and white—but since no such distinction registered in the law, it made no legal difference. Thus, leading externalists—just like leading internalists—could, and did, support the 1937 constitutional revolution as a legal matter. Once constitutional law again recognized the law-politics distinction, however, an externalist account undermined the legal foundations of the new constitutional era.

Internalism is different. If historically accurate, internalism saves the New Deal era by demonstrating its genuine legal origins and nature. But while the defense succeeds conceptually, it fails historically. Overwhelming evidence exists that demonstrates politics in fact produced the 1937 “switch in time.”

Hybrid theories can overcome this problem. Like Ackerman and Farber, Shesol and Solomon reach internalist-like, New Deal-saving conclusions without relying on flawed internalist history. Each writer acknowledges, as strict internalists will not, evidence of political influence in the 1937 constitutional revolution. At the same time, by not sharply distinguishing politics from law in *history*, they avoid concluding that politics produced the New Deal era in *law*.

Until the 1980s, then, historians employed the law-politics distinction in analyses of 1937—yielding the internalist-externalist debate—while judges eschewed the law-politics distinction in legal analysis. Now, the situation is reversed. As judges came to accept a law-politics distinction, historians came to abandon it—and, in that way, produced a defense of the very constitutional results that had flowed from abandoning the distinction in law. Viewed in this light, the internalist-externalism debate has been an internal disagreement among those who want to preserve the constitutional regime of 1937—but who disagree about what to say, and how much to say, about underlying legal revolution.

The significance of Simon's book both lies in what it shares with these other accounts and also in how it differs from them. Other authors conclude that the law-politics distinction is false, or at least overstated, in historical analysis. But Simon pays no heed to the distinction at all, not even to criticize it. Instead, he offers an account in which the law-politics distinction simply vanishes. Roosevelt and Hughes are portrayed as larger-than-life figures on an apparent collision course, whose eventual meeting produced a new legal world. The elements of a secular history are all present in his book, but Simon recombines and sometimes inverts them to conform to this account of how of a new legal world was born. Simon goes farther than other authors, I suspect, because the imperative of saving the New Deal era in law has become more urgent and because, as a lawyer, he feels it more strongly.

Part II of this review summarizes Simon's biographical account of Hughes and Roosevelt. Part III examines Simon's portrait of Hughes as the prime mover of events in 1937, and Part IV argues that Simon's conclusions are mistaken. Part V briefly characterizes Shesol's and Solomon's accounts. The Conclusion reexamines Simon's book and offers an assessment of its place in the literature and in present-day legal culture.

## II. FDR AND CHIEF JUSTICE HUGHES

*FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle over the New Deal* is, in form, a dual biography of Roosevelt and Hughes. It depicts Court-packing as the fulcrum of both lives, as well as a turning point in the



life of the nation.<sup>15</sup> Readers learn about Roosevelt's and Hughes' early careers and personal lives. Simon is especially evocative when describing FDR's contracting polio, his attempts at rehabilitation, and the physical disabilities that remained. One especially compelling passage describes Roosevelt physically assisting other polio patients. (p. 167) While Simon occasionally links singular life events to larger themes—describing polio, for example, as “a virus that would change . . . [FDR's] life and the nation's destiny”—the book generally employs a lighter touch, with Simon allowing readers to reach their own conclusions about how singular events shaped his subjects and the nation.

The book is organized chronologically. It opens with a “Prologue” anticipating what is to come. Chapter 1 traces Hughes' life through 1916, when he resigned as an Associate Justice of the Supreme Court to run for President against Woodrow Wilson. Chapter 2 turns to FDR and also ends in 1916—with Assistant Secretary of the Navy Roosevelt standing next to President Wilson shortly before Democrats nominated Wilson to run for reelection against Hughes.

Later chapters examine both lives, with a section about one followed by a section about the other. This format presents narrative challenges, but Simon—who has employed the joint biography format before—handles transitions with great skill. What emerges is a depiction of two lives running on different tracks, until those tracks seemed about to collide in 1937.

The two lives covered much similar ground. Both Roosevelt and Hughes served as reform governors of New York, and each had significant involvement with naval affairs.<sup>16</sup> Because of these and other echoes, when reading about one man the reader often feels the presence of the other. This literary effect reflects Simon's skill as an author, and also perfectly suits his themes.

Hughes is much less well known than Roosevelt today. Brilliant, blessed with a photographic memory (p. 101), and extraordinarily hard-working, Hughes became a leading lawyer of his era. He became wealthy representing corporations, but he also exposed business wrongdoing and proved a dedicated reform governor of New York. In 1910 President Taft, reflecting a widely held view, remarked to an aide, “I don't know the man I admire more than Hughes . . . [if] ever I have the chance I shall offer him the Chief Justiceship.” (p. 43) Justice Brewer died a few days after that comment, however, and the President offered Hughes the now-vacant Associate Justiceship. At the time, Taft told Hughes that he “believed[d] as strongly as possible that you are likely to be nominated and elected President sometime in the future unless you go upon the Bench.” (p. 43)

Although not a particularly warm person, Hughes was adept at professional relationships. Before joining the Court, Felix Frankfurter described him as “the most politically calculating of men.” Then Frankfurter attended the first Saturday case conference. As Simon tells it:

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<sup>15</sup> The book is 402 pages long. Approximately 250 pages describe Roosevelt's and Hughes' lives before Court-packing; approximately 100 pages recount the Court-packing controversy itself; and only about 50 pages portray Roosevelt and Hughes after 1937—even though FDR would remain in the White House longer than any other president.

<sup>16</sup> Roosevelt, as noted above, served in the Wilson administration as Assistant Secretary of the Navy. Hughes, as the Secretary of State in the Harding administration, negotiated a treaty limiting the size of navies.

Frankfurter dressed casually in an alpaca coat and slacks . . . . Upon entering the well-appointed conference room, he was chagrined to find that all his new colleagues wore suits. At the lunchtime break, Frankfurter rushed home, changed into a suit, and returned for the afternoon session. He was greeted by Chief Justice Hughes, who had also made a lunchtime change of dress, and now wore *his* alpaca coat. . . . Frankfurter was soon effusively praising Hughes' leadership skills . . . . (p. 363)

There were some near-collisions before 1937. In 1920, Roosevelt became the Democratic candidate for Vice President; in that same year, leading Republicans asked Hughes to run for President again. Still mourning the death of a daughter, Hughes declined. (p. 123) In 1926, Hughes declined an invitation from Republican leaders to again run for governor of New York; two years later, Roosevelt won New York's governorship as a Democrat.

Notwithstanding these harbingers of conflict, the book treats Hughes and Roosevelt as complementary parts of something larger. Hughes possessed a commanding intellect; Roosevelt, profound compassion. Both former New York governors, they went on to head different branches of the national government. Each had remarkable political skills, though Simon describes Hughes as "a shrewder politician than the President." (p. 341) I noted earlier that when reading about Roosevelt or about Hughes, readers sometimes sense the other's presence. That literary effect enhances the idea of a profound connection, verging on twin-hood, between Roosevelt and Hughes.

Simon's subtitle includes the phrase "epic battle," but the book actually portrays Roosevelt and Hughes as coming together in 1937—and, as they did so, law and politics and even the nation coming together too. Histories of Court-packing usually describe serious damage in the controversy's aftermath—damage to the Court's standing<sup>17</sup> and/or damage to Roosevelt, who never recovered his sway over Congress on domestic issues after losing the Court-packing battle.<sup>18</sup> In Simon's telling, however, no casualties and no damage occurred. Simon depicts not the aftermath of a battle, but the rebirth of a united nation—one with a modern constitutional system, capable of defending liberty at home and abroad.

On Simon's view, the Chief Justice and the President belonged to the same side, the side of liberty. After 1937, Hughes presided over a Court that rendered path-breaking civil liberties decisions. Meanwhile, Roosevelt led the defense of liberty across the globe. Simon writes:

Roosevelt was slow to recover from the Court-packing debacle. Emboldened conservative Democrats and Republicans blocked the liberal president's legislative agenda. Midway through his second term, Roosevelt appeared to be a weak, lame-duck president. But he never lost his confidence and, like Hughes, never ceded leadership. He [Roosevelt] outmaneuvered isolationist . . . senators, many of whom had opposed his

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<sup>17</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (describing the Court's "repudiat[ion]" of its narrow conception of the Commerce Clause in 1937 as "one of this Court's most chastening experiences").

<sup>18</sup> See, e.g., SHESOL, *supra* note 1, at 524 (observing that the "New Deal never recovered its lost momentum" and that "Roosevelt never regained his squandered mandate").

Court-packing plan, to expedite essential aid to Great Britain as the Allies hovered on the brink of defeat at the start of the Second World War. (p. 8)

Thus, Hughes and Roosevelt aligned on the major political issue of their times, just as (if Simon correctly describes Hughes' approach to constitutional law) Hughes' and Roosevelt's constitutional views were aligned in 1937.

Blurring the very line between politics and law—and between the political sphere and the judicial,—Simon describes a Hughes Court decision as “provid[ing] . . . a striking antidote to Hitler’s racist rants.”<sup>19</sup> (p. 374) Simon even observes that the Hughes Court became what “could accurately be called the Roosevelt Court” after Hughes retired, FDR having appointed seven of the Justices. (p. 392) Court-packing critics, who worried about the Court becoming politicized, feared the emergence of a Court that might be aptly named after a president. Simon apparently sees no problem.

Simon’s Prologue and penultimate chapter describe the same meeting between Roosevelt and Hughes, perhaps their only non-public meeting in the book. Hughes had just announced his retirement, and FDR responded with an invitation to lunch at the White House. In any dual biography, a physical meeting between the subjects has outsized narrative significance. This meeting, however, seemed to mark the entire epoch. “They talked alone,” Simon observed in the Prologue, “sharing for the last time their common bond of national leadership at a critical point in American history.” (p. 8) Describing the same event in the penultimate chapter, Simon suggests something more profound than a mere common bond. “[T]he two men talked,” Simon writes,

“Governor” to “Governor”; President to Chief Justice; American to American. (p. 386)

In short, FDR and Hughes had a near-collision in the Court-packing controversy—but the resulting “epic battle” produced national unity, and no damage to either the President or the Court. Simon attaches little weight to FDR’s loss of domestic political influence. And he completely overlooks what would lead Justice Souter to describe 1937 as the Court’s most “chastening” moment.<sup>20</sup> Instead, he depicts Hughes and Roosevelt effortlessly occupying the same biographical, political and legal space—another sign that they represented complementary parts of a single larger entity.<sup>21</sup>

### III. AVOIDING EXTERNALISM

#### *A. An Externalist Tilt*

Simon, Shesol and Solomon do not explore the law very deeply. Each recounts the Court’s decisions and includes a few sentences about basic doctrines, such as the

<sup>19</sup> Shortly before retiring, Hughes suggested the same point in a speech to the American Law Institute. As paraphrased by Simon, Hughes argued that “[t]he Court would help turn the tide against fascism by demonstrating to the world the nation’s high constitutional standards of justice.” (p. 385).

<sup>20</sup> *Lopez*, 514 U.S. at 604 (Souter, J., dissenting).

<sup>21</sup> Even Simon’s title -- FDR AND CHIEF JUSTICE HUGHES—is consistent with this complementary relationship.

ill-fated distinction between “direct” and “indirect” effects on interstate commerce. Simon makes some claims about Hughes’ constitutional views, and Shesol and Solomon do likewise for Roberts. None of these analyses compares to what one would find in a constitutional law casebook, much less a law review article.

This feature is hardly objectionable in a general history. Yet the case outcomes alone—which the authors describe—strongly point toward political influence, and that fact alone gives these accounts an externalist slant. For example, *Carter v. Carter Coal Co.*<sup>22</sup> held in 1936 that no matter how much manufacturing might affect interstate commerce, Congress could not regulate wages and hours in manufacturing enterprises. In 1937, however, *N.L.R.B. v. Jones & Laughlin Steel Corp.* upheld congressional authority over wages and hours in a manufacturing enterprise.<sup>23</sup> In 1936, *Morehead v. New York ex rel. Tipaldo* deemed state minimum wage laws for women violations of substantive due process.<sup>24</sup> In 1937, *West Coast Hotel Co. v. Parrish*<sup>25</sup> overturned *Tipaldo* and upheld a state minimum wage law for women. In 1936, *United States v. Butler*<sup>26</sup> circumscribed the federal tax and spend power in light of federalism concerns. But during the 1937 term the Court upheld the Social Security Act in a series of opinions that, as characterized by Shesol, “took an even more expansive view of the federal taxing and spending power . . . than the most optimistic government attorneys had thought possible.”<sup>27</sup>

These bare results suggest that something extraordinary occurred between the 1936 and the 1937 decisions—which is precisely when FDR’s determination to move against the Court became known. Internalists attempt to counter the inference by arguing that doctrinal shifts were already underway before 1937. Simon, Shesol and Solomon cannot make that argument effectively, however, because they say so little about doctrine. What remains, then, is a stark doctrinal about-face in three different areas of constitutional law at the exact moment when Roosevelt threatened the Court.

### B. Simon and Chief Justice Hughes

#### 1. A Hughes Court

Simon readily acknowledges a doctrinal shift during the 1936-37 term. “The Chief Justice’s opinion in *Parrish*,” he writes, pointed “in a direction that promised to accommodate progressive legislation passed in the states and by the New Deal Congress,” a development that “had appeared all but impossible only a year earlier.”<sup>28</sup> (pp. 326-27) Moreover, Hughes’ *Jones & Laughlin* opinion “demolished

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<sup>22</sup> 298 U.S. 238 (1936).

<sup>23</sup> 301 U.S. 1 (1937).

<sup>24</sup> 298 U.S. 587 (1936).

<sup>25</sup> 300 U.S. 379 (1937); CUSHMAN, *supra* note 11, at 18.

<sup>26</sup> 297 U.S. 1 (1936).

<sup>27</sup> SHESOL, *supra* note 1, at 453-54 (discussing *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) and *Helvering v. Davis*, 301 U.S. 619 (1937)).

<sup>28</sup> Some internalists hypothesize a deep connection between substantive due process, tax and spend, and commerce clause doctrines, with change in one area inevitably producing change in the others. It is not clear whether Simon intended to endorse that view here -- or whether he meant only that the Court had ceased invoking substantive due process to strike

the direct-indirect commerce clause analysis that had been championed by conservative justices for more than forty years.” (p. 328)

Yet Simon is not an externalist. Instead, he claims that Hughes’ leadership in 1937 produced a majority for the Chief Justice’s own unchanging constitutional views. In effect, Simon claims that while doctrine changed, Hughes’ views about doctrine did not—Hughes’ views, somehow, are what mattered:

Roosevelt later claimed that he lost the court battle but won the war. He was only half right. He certainly lost the battle over his Court-packing plan. Throughout the arduous process, Hughes proved to be a shrewder politician than the president. His letter to the Judiciary Committee [criticizing Roosevelt’s plan] was instrumental in its defeat . . . But Hughes, not Roosevelt, was also the victor in the larger war. With a critical assist from Justice Roberts, he astutely steered the Court away from outmoded constitutional interpretations that had obstructed progressive social and economic legislation. The Chief Justice also demonstrated that he was a wiser statesman than Roosevelt. With dignity, he successfully defended his institution’s integrity and independence, withstanding taunts and repeated attacks by the most popular president in modern American history. (pp. 341-42)

The theme of Hughes’ leadership looms large in *FDR and Chief Justice Hughes*, where it plays essentially the role that doctrinal evolution does in internalist theory. For Simon, Hughes was more than FDR’s equal as a leader—which is saying a lot because Roosevelt was “the greatest president of the twentieth century.” (p. 402) But it remains unclear how “leadership”—as opposed to a doctrinal switch—saved the Court from being packed.

Hughes himself had emphasized leadership in his 1927 lectures about the Supreme Court. Simon writes:

Hughes . . . declared that leadership on the . . . Court depended on “strength of character” and “ability . . . [to manage] the intimate relations of the judges.” A Chief Justice’s influence . . . rose in direct proportion to his colleagues’ perception of his “[c]ourage of conviction, sound learning, familiarity with precedents, [and] exact knowledge due to painstaking study of the cases under consideration.” (p. 192)

This description *by* Hughes clearly matches Simon’s portrait *of* Hughes.

The 1927 lectures were also relevant in another way. Hughes’ argument, according to Simon, contained a

cautionary warning to Hughes himself after he became Chief Justice. It was essential, Hughes had said, that the Court project an institutional image of objectivity; the justices should be perceived by the public as men of integrity, who were above partisan politics. When the Court’s

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down “progressive legislation.” In addition, Simon’s observation that the 1937 decisions “appeared all but impossible” a year earlier leaves open the possibility that appearances were deceiving. Since Simon argues that Hughes’ 1936 votes did not reflect his actual views, *see* discussion *infra* Part III.B.2, Simon perhaps thinks so.

rulings appeared to be based on the justices' political biases, the Court's authority was diminished by a "self-inflicted wound." (p. 192)

Simon mentions only one self-inflicted wound at this point, the calamitous decision in *Dred Scott*. Earlier in the book, however, Simon had mentioned two other such wounds. These were

decisions in which new appointees provided crucial votes to reverse rulings on the constitutionality of paper currency legislation during the Civil War and, later, the federal income tax. (p. 173)

And observers had described these other decisions as the result of "Court-packing."

## 2. Hughes' Votes

If Hughes' votes in 1937 reflected his long-time, unchanging views, why did Hughes vote with the conservative Justices in earlier New Deal cases? In 1932, for example, *New State Ice Company v. Liebmann*<sup>29</sup> invalidated an Oklahoma law that required a license in order to make or sell ice. The majority opinion, joined by Hughes and Roberts, deemed the law an infringement of the liberty to practice one's trade. Manufacturing or selling ice, according to the majority, was not a "business clothed with a public interest"<sup>30</sup> subject to enhanced government regulation. Dissenting, Justice Brandeis argued that "[t]he notion of a distinct category of business 'affected with a public interest' . . . rests upon historical error."<sup>31</sup>

*New State Ice* was not destined to play a large role in the internalism-externalism debate. In 1934, Roberts' majority opinion in *Nebbia v. New York*<sup>32</sup> echoed Brandeis' *New State Ice* dissent and declared *all* businesses to be potentially affected with a public interest. For internalists, *Nebbia* shows that Roberts' views had changed before Roosevelt's reelection and the Court-packing plan. For externalists, the pivotal substantive due process cases, *Tipaldo* and *Parrish*, came four and five years after *New State Ice*, respectively. On either view, *New State Ice* came too soon to be historically decisive.

*New State Ice* looms larger for Simon, however, because of his claim that Hughes' constitutional views never changed. Simon writes:

[I]t is difficult to understand why Hughes, who prided himself on making decisions based on the facts of a case without ideological predilections, did not conclude, like Brandeis . . . that the . . . regulation was a reasonable response to an economic crisis. He may have made the pragmatic decision to contribute a sixth vote to the conservative majority to reinforce the Court's image of legitimacy, even if he found the dissenters' constitutional interpretation more persuasive. But if his vote was primarily based on that institutional consideration, then he would seem to have forsaken one of his proclaimed attributes of individual leadership on the court—"courage of conviction." (pp. 203-04)

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<sup>29</sup> 285 U.S. 262 (1932).

<sup>30</sup> *Id.* at 273.

<sup>31</sup> *Id.* at 302.

<sup>32</sup> 291 U.S. 502 (1934). Hughes joined Roberts' opinion.

Unlike *New State Ice*, the *Carter Coal* decision in 1936 presents a major problem both for internalists and for Simon. The decision drew a sharp distinction between direct and indirect effects on interstate commerce, using that distinction to rule out any federal regulation of labor in manufacturing, mining or agriculture. A year later, however, *Jones & Laughlin* upheld precisely the kind of federal regulation that *Carter Coal* categorically ruled out.

The difficulty for internalists lies in the sequence of events—*Carter Coal*, followed by Roosevelt's reelection and his attack on the Court, followed by *Jones & Laughlin*. The difficulty for Simon arises because of his contention that Hughes had long favored an expansive conception of interstate commerce. If that was true, why did Hughes adopt a narrow view and adhere to the direct-indirect distinction in *Carter Coal*?<sup>33</sup>

According to Simon, Hughes' conception of the Commerce Clause dated back to 1914. As an Associate Justice, Hughes wrote the Court's opinion in the *Shreveport Rate Case*,<sup>34</sup> upholding federal regulation of intrastate railroad rates when those rates affected the market for interstate rail service. (pp. 29-30) For Simon, Hughes considered the magnitude of an "effect" on commerce to be decisive in 1914. Regarding *Carter Coal*, Simon writes:

The majority's rigid line drawing [in *Carter Coal*] between direct and indirect effects on interstate commerce was a throwback to an earlier constitutional era that Hughes himself had discredited as an associate justice in his . . . *Shreveport Rate Case* opinion. As his critics have charged, Hughes's vote with the conservative majority may have reflected his overriding concern with the Court's public image more than devotion to constitutional principle. (p. 391)

Then there is Hughes' vote in *Butler*, the 1936 decision that invalidated the Agricultural Adjustment Act. Writing for the Court, Roberts' opinion treated the right of states to regulate agriculture as a strict limit on federal authority under the Tax and Spend Clause. Simon reports that Hughes opened the case conference by suggesting the Act be overturned as "a regulation of agriculture that invaded the reserve[d] rights of the states under the Tenth Amendment." (pp. 278-79) Simon also notes that Attorney General Cummings told the Cabinet that "the Chief Justice does not like five-to-four opinions and if Justice Roberts had been in favor of sustaining AAA [in *Butler*], the Chief Justice would have cast his vote that way also." (pp. 281-2) Because of Hughes' conference remarks,<sup>35</sup> Simon thinks that Cummings was mistaken. Yet Cummings' report about Hughes and *Butler* dovetails with Simon's own conclusions about *Carter Coal* and *New State Ice*—namely, Hughes voted with conservatives only because he considered a six- to-three decision better for the Court than a five-to-four one.

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<sup>33</sup> Hughes wrote a concurrence; for discussion, see *infra* this part & Part III.B.3.

<sup>34</sup> *Houston, E. & W. T. Ry. Co. v. United States* [The *Shreveport Rate Case*], 234 U.S. 342 (1914).

<sup>35</sup> Shesol offers a slightly different account of the conference. Citing Justice Stone's papers, Shesol describes Hughes as first proposing to strike down the act as an unconstitutional delegation of legislative power. Finding "no takers" for that position, he then "argued that the act invaded the reserved powers of states" and "the conservatives agreed." SHESOL, *supra* note 1, at 193.

Rather than directly criticize Hughes' *Butler* vote, Simon quotes a remark Justice Stone later made to Frankfurter. The problem, Stone said, was "'lack of vision' and the unwillingness of certain gentlemen [Hughes and Roberts] to trust their own intellectual process." In Stone's view, Hughes was "chiefly responsible." (p. 282) And Simon attributes to Stone a criticism that—from Simon's point view—is devastating:

The problem, Stone concluded, was a failure of leadership by the Chief Justice. (p. 282)

Simon never explains, however, how Hughes' voting in accordance with his convictions in *Butler*—if that is what he did—could constitute "a failure of leadership."

### 3. Justice Roberts

Although Justice Roberts generally looms large in internalist-externalist debates, he plays a relatively small role in *FDR and Chief Justice Hughes*. Contemporaries believed Hughes and Roberts both "switched." Historians generally focus more on Roberts, however. Less doctrinaire than Roberts, Hughes seems more likely to have changed his mind in 1937 for legal reasons, rather than because of political pressure. In addition, Hughes had been a political progressive. And perhaps most importantly, Roberts either wrote or joined the opinions in *Tipaldo*, *Carter Coal* and *Butler* during the 1935-36 term. Hughes, on the other hand, dissented in *Tipaldo* and wrote separately in *Carter Coal*.

Yet Hughes and Roberts did not fundamentally differ on questions of federal power. The majority opinion in *Carter Coal*, which Roberts joined, invalidated wage and hour regulations as beyond federal power and invalidated price regulations on the ground that they were not severable from the wage and hour provisions. Hughes agreed about unconstitutionality of the wage and hour regulations, but found the price provisions severable and would have upheld them. Conceivably, Roberts would have sustained the price regulations too had he reached that question; Roberts and Hughes might have disagreed only about severability.

The differences seemed greater in *Tipaldo*. Hughes voted to uphold the minimum wage statute; Roberts voted to invalidate it. Written narrowly, Hughes' opinion distinguished the statute before the Court from a statute struck down in a 1923 case, *Adkins v. Children's Hospital*.<sup>36</sup> Alone among the Justices—or so it seemed at the time—Hughes never reached the question of overruling *Adkins*. On the other hand, the majority opinion, joined by Roberts, expressly reaffirmed *Adkins*.

After Hughes' *Tipaldo* dissent, no one should have been surprised that he voted the next year to overrule *Adkins* in *Parrish*. Roberts, on the other hand, joined both the *Tipaldo* opinion reaffirming *Adkins* and the *Parrish* opinion overruling it. Based on Roberts' later recollections and on some indications in the *Tipaldo* majority opinion itself, internalists argue that Roberts never intended to reaffirm *Adkins* and that he voted with the majority in *Tipaldo* only because the state had failed to argue that *Adkins* should be overruled. However that may be, the case for Roberts "switching" on the minimum wage is much stronger than the case for Hughes doing so.

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<sup>36</sup> 261 U.S. 525 (1923).



Like many historians, Shesol and Solomon focus on Roberts and his 1937 votes. Simon, on the other hand, treats Roberts as a mere adjunct to Hughes. Moreover, when Simon does discuss Roberts, he follows internalists by focusing on substantive due process and *Parrish* while ignoring questions of federal power and *Jones & Laughlin*. Simon writes:

“[W]ith the shift by Roberts,” Frankfurter wrote [to] Roosevelt, “even a blind man ought to see that the Court is in politics” . . . .

Pundits later joined Frankfurter in his contemptuous assessment of Roberts’ vote in *Parrish* . . . . Feeling the heat of Roosevelt’s Court-packing plan, Roberts, they concluded, caved in to political pressure. Both Roberts and Hughes knew that explanation was wrong, since Roberts had voted to overturn the Washington minimum wage statute [at a case conference] more than a month before Roosevelt announced his Court-packing plan.

The public demeaning of Roberts infuriated Hughes. He not only resented the false accusation, but he also was appalled by the implicit attack on his colleague’s character. He knew that the sixty-two-year-old Roberts (who would not have been affected by Roosevelt’s plan) had no intention of quietly bending to the president’s will. After the plan was announced, Roberts vowed to resign in protest if the proposal became law. Unlike Roberts, Hughes never considered resignation. “If they want me to preside over a convention,” he said defiantly, “I can do it.” (p. 327) (footnote omitted)

We hear nothing from Simon, however, about why Roberts performed his apparent constitutional about-faces on the meaning of the Commerce and Tax and Spend clauses.

Despite Roberts’ vote in *Tipaldo*, there is an argument that he would have sustained the law in *Parrish* even if Roosevelt had failed to gain reelection.<sup>37</sup> *Nebbia* suggests—and internalists claim—that Roberts’ substantive due process views shifted before 1937. The same cannot be said, however, about Roberts’ views on tax and spend and commerce issues. There, he took unequivocal stands in 1936 and reversed those stands in 1937. Simon’s observation that Roberts lent a “critical assist” to Hughes in 1937 sheds no light whatsoever on why. It simply avoids the question.

Beyond that, the internalist view of *Parrish*, which Simon echoes, is mistaken. It is true that Roberts “vote[d] . . . to overturn the Washington minimum wage statute in December, 1936 [at a conference on the case], before Roosevelt announced the Court-packing plan.” However, it was widely understood in December that Roosevelt was about to move against the Court. Shesol notes that almost everyone at the time “saw action against the Supreme Court as inevitable.”<sup>38</sup> The Justices did not know the precise form it would take—a constitutional amendment, Court-packing or

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<sup>37</sup> For discussion, see Gelman, *supra* note 5, at 475-79 (describing various explanations of Roberts’ votes).

<sup>38</sup> SHESOL, *supra* note 1, at 245.

something else. When they voted in *Parrish*, however, they had every reason to know that an attack from the President was imminent.

Simon also alludes to the argument that Roberts' "character" precluded a politically motivated switch—an argument that Felix Frankfurter first offered in a 1955 memorial tribute to Roberts.<sup>39</sup> Yet no one had ever charged Roberts with acting for base or selfish motives, and it remains unclear why personal "character" mattered. Beyond that, and at least by contemporary standards, it hardly reflects badly on a Justice when he or she subordinates personal views to the good of the Court.

Simon also points out that, at age 62, Roberts "would not have been affected by Roosevelt's plan" and that the Justice "vowed to resign in protest if the proposal became law." Yet no Justice's tenure would be "affected" by Court-packing. FDR had proposed creating an additional seat on the Court when a Justice failed to retire at age 70; the President did not propose removing older Justices. Perhaps Simon wanted to highlight the fact that Roberts, being younger than 70, would not have regarded the Court-packing proposal as a personal slight. But, again, no one suggests that Roberts switched because he felt slighted.

Simon's second observation—that Roberts would prefer resigning to serving on a packed Court—only demonstrates that the Justice found Court-packing abhorrent. Feeling that way, however, Roberts presumably would have been eager to avoid Court-packing—perhaps even by "switching" his positions. In this way, Simon's observation undercuts his argument.

#### IV. CHIEF JUSTICE HUGHES

Simon seems unaware that his account of Hughes resembles Frankfurter's and Stone's unflattering portrait of a judge who did not vote his own convictions.<sup>40</sup> As noted earlier, Simon thinks that Hughes very possibly voted in *Carter Coal* and *New State Ice* contrary to his real constitutional views because of "institutional consideration[s]" related to the good of the Court. Yet that would seem to make it more likely Hughes also voted in the 1937 cases based on "institutional consideration[s]" rather than conviction. If Hughes switched sides earlier to create a larger majority in some cases, surely he also would switch sides to save the Court from being packed—a much greater threat. True, Hughes would have done so for the good of the Court—but the exact same thing is true of Roberts. Simon's overall judgment that Hughes "won the war" in 1937 is as incongruous as a claim that Roberts had "won" by switching positions.

Even if Hughes' votes in the 1937 cases reflected his actual views, as Simon believes, it remains odd to credit those views—rather than political pressure—for the Court's switch. If Hughes voted his convictions when the Court's political situation allowed, and voted contrary to his convictions when the Court's political situation required, the operative variable becomes the Court's political situation—not Hughes' convictions. Frankfurter, believing that Hughes had voted against his real convictions in *Butler*, may well have believed Hughes voted consistently with those

<sup>39</sup> Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955). For an insightful discussion of Frankfurter's argument, see Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994).

<sup>40</sup> Instead, Simon's portrait of Hughes suggests that he calibrated his votes in order to maintain day-to-day leadership of the Court. See discussion *infra* Part III.B.1.

convictions in the Social Security cases. Yet after the Social Security decisions Frankfurter condemned “the political somersaults (for such they are) of the Chief and Roberts.”<sup>41</sup> Simon, by contrast, declared Hughes the victor.

Beyond that, Simon’s basic premise—his claim that Hughes always had held an expansive view of federal power—is simply mistaken. In *Butler*, Hughes argued that the federal tax and spend power was limited by considerations of state sovereignty. But if Hughes voted his real convictions in *Butler*, as Simon suggests, the Chief Justice in fact held a narrow conception of federal power in 1936.

Simon’s account of Hughes and the commerce power is also flawed. In Simon’s view, *Carter Coal*’s distinction “between direct and indirect effects on interstate commerce” represented “a throwback to an earlier constitutional era that Hughes himself had discredited” in the *Shreveport Rate Case*. (p. 391) But *Shreveport* was a seven to two decision, and apparently not very controversial when decided. The dissenters in that case did not even write an opinion. Nor did anyone seem to think that constitutional era had ended in 1914—as they should have if *Shreveport* really was revolutionary.

Far from discrediting the direct-indirect distinction in 1914, Hughes himself introduced that distinction to Commerce Clause jurisprudence in 1935. Hughes wrote for the Court in *A.L.A. Schechter Poultry Corp. v. United States*,<sup>42</sup> invalidating the National Recovery Act’s wage and hour provisions. After discussing the long-recognized distinction in antitrust cases between direct and indirect effects on commerce, Hughes observed:

While these decisions related to the application of the Federal [antitrust] statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise . . . there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government.<sup>43</sup>

Though *Schechter* sometimes is described a case the government lost on the facts,<sup>44</sup> Hughes hardly would have imported the direct-indirect distinction into constitutional law without appreciating its significance. Moreover, as Simon himself relates, Justice Brandeis summoned two “protégés” of Frankfurter and said that Frankfurter should inform the President that *Schechter* and other cases “change everything” because “[a]ll of the powers of the States cannot be centralized in the federal government.” (p. 266) Brandeis apparently did not agree that a weak factual

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<sup>41</sup> JAMES F. SIMON, *FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL* 337 (2012).

<sup>42</sup> 295 U.S. 495 (1935).

<sup>43</sup> *Id.* at 548. Describing *Schechter* earlier in the book, Simon merely observed that Hughes’ “distinction [in *Schechter*] was puzzling, since that formulaic line drawing had been discredited by constitutional scholars and largely abandoned by the Supreme Court shortly after it was first introduced . . .” (p. 263).

<sup>44</sup> Discussing the Chief Justice’s later recollections, Simon observes that he “could easily justify decisions striking down poorly drafted bills, such as the National Industrial Recovery Act” that was at issue in *Schechter*. (pp. 390-91).

record or poor legislative drafting had produced the *Schechter* decision. Instead, he regarded Hughes' opinion as a line drawn in the sand—a line between the federal government and “centralized” power.

During the following term, Hughes' “[s]eparate opinion” in *Carter Coal* applied the direct-indirect distinction to invalidate wage and hour provisions, exactly as the majority opinion did. Hughes began his opinion by “agree[ing]” with the majority that

Production—in this case mining—which precedes commerce is not itself commerce; and that the power to regulate commerce among the several states is not a power to regulate industry within the state.<sup>45</sup>

Hughes continued:

Congress may not use . . . [its power to protect the processes of interstate commerce] as a pretext . . . to regulate activities and relations within the states which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effects, Congress . . . could assume control of virtually all the activities of the people to the subversion of the fundamental principle of the Constitution. If the people desire to give Congress the power to regulate industries within the state, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.<sup>46</sup>

In short, far from leading the constitutional revolution, Hughes declared in 1936 that no such revolution would occur without a constitutional amendment—because the Court would not abandon the direct-indirect distinction Hughes himself had introduced in *Schechter*. Yet one year later a constitutional amendment no longer was necessary, as Hughes' *Jones & Laughlin* opinion upheld federal regulation of employer-employee relations in manufacturing enterprises.

Simon offers other problematic, and sometimes inconsistent, judgments about Hughes. He writes, for example, that Hughes

guided the Supreme Court through a period of judicial turbulence in which the justices gradually uprooted the old conservative doctrines of the Taft Court. At times, especially in 1936, it appeared that the Chief Justice had lost control. But despite the powerful centrifugal forces at work on his right and left, he held the Court together. (p. 392)

Yet Simon himself demonstrates that Hughes did *not* hold the Court together. In fact, until the conservatives retired the Justices remained deeply divided. Nor did the “justices gradually uproot . . . old conservative doctrines.” A standard internalist claim, the idea of “gradual” doctrinal change may, or may not, be defensible with regard to substantive due process. Concerning federal power, however, the Court's and Hughes' about-face was sudden and stark in 1937—and Simon offers nothing that indicates otherwise.

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<sup>45</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (separate opinion of Hughes, C.J.).

<sup>46</sup> *Id.* at 317-18.

Simon's claims about the Chief Justice's supposed "incremental" approach to constitutional change are seriously overstated and even at odds with other claims in the book. (p. 392) Describing Hughes' *Jones & Laughlin* opinion, for example, Simon observes that it "distinguish[ed]" *Carter Coal* on the facts and therefore allowed Roberts to join it." (p. 336) This overlooks the fact that any possible factual differences between the cases would have been irrelevant had *Carter Coal* and the direct-indirect distinction remained good law. In any event, and as noted earlier, Simon also treats *Jones & Laughlin* as the decision that "demolished" the direct-indirect distinction and thereby ended an entire "era" in constitutional law. Thus, for Simon, the same decision simultaneously counts as incremental and as epoch-making.

Simon observes that Hughes' "progressive instincts were deep" but were also

tempered by an innate caution. Had he been an ideologue, either on the right or left, his tenure as Chief Justice would almost certainly have ended badly, further polarizing a divided Court. Instead, his incremental approach to constitutional transformation enabled him to preserve both the image and reality of a strong Supreme Court and, in the process, resist the enormous political pressure exerted by President Roosevelt. Once the threat of FDR's Court-packing plan had run its course, Hughes led the Court with renewed confidence, ushering in the modern constitutional era. (p. 392)

In many ways, this passage stands the actual events on their head. As just noted, Hughes' "approach to constitutional transformation" was not "incremental" on questions of federal power. With respect to substantive due process, Hughes' *Tipaldo* opinion might qualify as "incremental" because it distinguished, rather than overruled, *Adkins*. Because Hughes failed to persuade any other Justice in *Tipaldo*, however, his opinion there contributed neither to "the image . . . [nor the] reality of a strong Supreme Court." Indeed, the Court's turnabout from *Tipaldo* to *Parrish* epitomized for many the Court's "switch." Finally, with almost everyone in 1937 believing the Court had bowed to political pressure, Simon's claim that Hughes maintained the "image of a strong Supreme Court" is extraordinary.

During the 1940s the Court did hand down significant decisions regarding civil liberties and, to some extent, racial justice. Moreover, the country accepted those decisions, showing that the "reality of a strong Supreme Court" had survived. Yet that happened for a reason precisely opposite to the one suggested by Simon. The Court retained its authority, not because of Hughes' supposed "incremental approach to constitutional transformation"—which did not exist—but because Hughes and Roberts switched to defeat Roosevelt's plan in 1937. Had Court-packing succeeded, the Justices would not have been in a position to hand down politically controversial decisions regarding race, school prayer, presidential power and abortion during the ensuing decades. Nor would the President or Congress have accepted such decisions.

Even Simon's criticism of Hughes for supposedly ignoring his real constitutional views is less than the whole story. For without saying so explicitly, Simon at times suggests that the demands of leadership on the Court required that Hughes vote contrary to true views. For example:

In Hughes' long career of public service . . . he had always moved his progressive agenda forward cautiously and with careful attention to the political limitations imposed on him . . . . And now, as Chief Justice, he

faced a serious institutional problem: If he attempted to lead the Court in a progressive direction, he would undoubtedly roil the tough-minded conservative bloc and could jeopardize the Court's public image of stability during an unprecedented national crisis. (pp. 192-93)

Thus "political limitations" required Hughes to avoid "roil[ing]" the conservative Justices—apparently, liberal Justices *could* be roiled—so as to preserve "the Court's public image of stability." To accomplish that, it seems, Hughes had to vote with conservatives—exactly as he did in *New State Ice* and *Carter Coal*. In Simon's view, then, did Hughes show lack of "courage" in those cases—or did he demonstrate "leadership"? Moreover, given Simon's analysis, what would Hughes do when "roiling" the President, rather than the conservative Justices, "jeopardize[d]" the Court?

## V. IMAGES OF THE PAST

Although they largely agree about events, Simon, Shesol and Solomon take different approaches to 1937. Focusing on Roosevelt and Hughes, Simon treats 1937 as a pivotal chapter in the larger story of American unity. Shesol, concentrating on Roosevelt, provides an almost moment-by-moment account of the Court-packing plan's conception, consideration and demise. Solomon focuses on Roosevelt, the Court, *and* Roberts, telling a story—not of national unity—but of a profoundly anti-democratic Court that finally accepted democracy in 1937.

In different ways, each author avoids an unambiguous conclusion that political pressure produced the "switch in time." In doing so, all three authors falter. But they falter in different ways, with dramatically different effects on the remainder of their analyses.

### A. Solomon

Solomon offers a dualist version of 1937, one that offers both an externalist and an internalist account of events. Thus, he virtually restates the case for externalism at one point, observing that Justice Roberts' "changes of heart" regarding the Commerce and Tax and Spend clauses

took place after the president had launched his assault on the Court, after the constitutional stalemate had jeopardized any solution to an economic crisis, after the chief justice had begun to fear for future of his beloved institution and had surely shared his worries with his friends. Owen Roberts could well have kept such things in mind.<sup>47</sup>

Solomon also examines lectures that Roberts delivered in 1951 after retiring from the Court. In Solomon's words, Roberts attributed his turnabout in 1937 to two things:

One was reality—[the need for] a unified economy. The other was democracy—the popular urge, the people's will. He said not a word about the law.<sup>48</sup>

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<sup>47</sup> SOLOMON, *supra* note 1, at 256-57.

<sup>48</sup> *Id.* at 217 (emphasis in original omitted).

Adhering to the framers' understanding, Roberts observed, "might have resulted in even more radical changes in our dual structure [of government] than those which have been gradually accomplished" by cases like *Jones & Laughlin*.<sup>49</sup>

Solomon concludes that Roberts:

had switched sides . . . to save the American system of federalism, to prevent the central government from assuming full power, as in Europe. By giving a little, he could avert something worse . . . The truly conservative position was to bend with the times.<sup>50</sup>

The "something worse" that Roberts averted obviously was Court-packing—which is why Roberts decided to yield to political pressure.

Yet Solomon also offers an internalist account, claiming that although "Roberts . . . switched,"<sup>51</sup> the Justice had genuinely "persuad[ed] . . . himself . . . of the need for a living Constitution."<sup>52</sup> To support this claim, Solomon cites Roberts' generally inchoate constitutional philosophy,<sup>53</sup> his personal character, his love of farming, his outstanding reputation among neighbors, and even his generously tipping to the Court barber.<sup>54</sup> In short, Roberts was the kind of person likely to favor measures for alleviating economic and human distress—who therefore would embrace concept of a living Constitution. Yet the Justice had been exactly the same person in 1936, before he switched.<sup>55</sup>

Thus, Solomon grafts an internalist account of Roberts on top of the externalist account that dominates the book.<sup>56</sup> Yet doing so did not affect the rest of Solomon's account. Solomon thinks that the Court-packing controversy produced an optimal outcome, leaving the nation "with a surer-footed but less tyrannical president, a more skeptical Congress, and a vigorous and independent judiciary that took the American people's needs into account."<sup>57</sup> Recognizing both the need for a changed constitutional jurisprudence and the dangers of concentrated executive power—and

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* "Giving a little" in fact meant giving a lot. It consisted of Roberts yielding on pervasive and fundamental questions of federal power.

<sup>51</sup> *Id.* at 216. Solomon also suggests that Roberts perhaps voted to uphold the minimum wage law in *Tipaldo* because he wanted to receive the 1936 Republican candidacy for President. *Id.* at 212. If that in fact happened, *Parrish*—not *Tipaldo*—likely reflected Roberts' actual views. For discussion of this possibility see Gelman, *supra* note 5, at 479.

<sup>52</sup> SOLOMON, *supra* note 1, at 216.

<sup>53</sup> *Id.* at 214.

<sup>54</sup> *Id.* at 215.

<sup>55</sup> Internalists often count doctrinal shifts as "legal," rather than political, when the shifts are prompted by broad changes in social and economic views. For discussion, see Gelman, *supra* note 5, at 506 (observing that "[i]nternalists view law as autonomous from [electoral] politics—but apparently not from [social and economic changes]").

<sup>56</sup> To be sure, Roberts probably *thought* that he should vote as he did in 1937. That tells us little, I believe, since even a bribed judge can sincerely believe that the bribe made no difference. Whatever Roberts' innermost thoughts, in my view externalism ought to count as correct if political pressure caused Roberts to think those thoughts.

<sup>57</sup> SOLOMON, *supra* note 1, at 276.

by no means averse to externalism—Solomon had no reason to provide a narrative that diverged from actual events.

### B. Shesol

Shesol's book demonstrates that Roberts and Hughes "switched" precisely at the moment when FDR threatened the Court.<sup>58</sup> Yet Shesol tacks on the unconvincing claim that we never can know why any judge votes in a particular way—and, therefore, we can never know why Roberts voted as he did in 1937. Shesol writes:

It is, in the end, impossible to know what sways a judge. Even the judges themselves do not always know whether their decisions are driven, in the main, by doctrine or emotion, by the dictates of law or politics or conscience. "Who knows what causes a judge to decide as he does?" Roberts once shrugged, reflecting on *Parrish*. "Maybe," he joked, "the breakfast he had has something to do with it."<sup>59</sup>

Yet everything else in Shesol's book, I believe, demonstrates that we do know what happened. One wonders whether *anything*—for example, hostile troops surrounding the Supreme Court—would prompt Shesol to conclude that outside pressure influenced a Justice.

Shesol adds a related point:

To acknowledge that external events play a role in decisions is frightening to many, for it suggests that the judicial system is, in the end, not one of laws but of men—and thus vulnerable to the prejudices and whims and base instincts of men.

But this is a false dichotomy—that a nation is governed either by law or by men, rather than dialectic between the two. It is one of the many unhelpful antitheses that prevailed at the time and persist to this day, among them the idea that the Court is either a purely legal institution or a political body . . . that legal doctrines are either preordained by the Constitution or are artificial constructs . . . [or] that justices are either impervious to social, political, and cultural influences or utterly at their mercy. The reality . . . is more complex.<sup>60</sup>

In my view, Shesol took complexity so seriously that he overlooked the possibility that simple principles can matter. In particular, he does not view Court-packing as a threat to the principle of judicial independence. Thus, he sees no problem whatever with Roosevelt's attempt to alter constitutional law via the Court-packing plan.

Shesol's views about complexity and the supposed limits on our knowledge allow him to escape from the conclusion that followed from the rest of his account—that politics produced the "switch in time." Yet his views about complexity and knowledge did not affect his narrative of the events in the least. Had Shesol decided

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<sup>58</sup> See generally Gelman, *supra* note 5 (arguing that Shesol's factual account undermines internalism).

<sup>59</sup> SHESOL, *supra* note 1, at 524.

<sup>60</sup> *Id.*



that we *can* know why Roberts switched, and that the Justice switched because of political pressure, not a single other word in *Supreme Power* would have had to change.

#### VI. CONCLUSION

Simon's book has a very different feel from the others. Because it covers Roosevelt's and Hughes' lives, less space remains for the Court-packing battle itself. That results in a less detailed account of 1937. In Simon's hands, however, the dual biography format also changes the details that matter.

Pivotal actors in other accounts play vastly diminished roles in *FDR and Chief Justice Hughes*. There is, for example Simon's treatment of Roberts as a mere adjunct to Hughes—as the Justice who “assisted” the Chief in 1937. Another case in point is Senator Bertram Wheeler, who led the Congressional opposition to Court-packing. Wheeler looms large in Solomon's and Shesol's books, even though they view him very differently. Shesol portrays Wheeler as an unprincipled politician driven by a petty political grudge against Roosevelt. For Solomon, on the other hand, Wheeler was a courageous progressive, deeply concerned about concentrated executive power. For his part, Simon pays virtually no attention to Wheeler, except as the conduit of a letter from Hughes that Wheeler read at a Judiciary Committee hearing.

Simon's diminished attention to other actors only enhances the roles of Roosevelt and Hughes, adding to the sense of them as the prime movers of events. Because one of them was a political, and the other a legal, figure, it might appear that Simon recognizes a dichotomy between law and politics. But, as noted earlier, Simon's politician supposedly shared the same constitutional views as the judge—and Simon's judge was the superior politician.

Seeing nothing to fight over in 1937, and regarding the opposing sides as essentially the same, Simon was only being true to his story when he saw no damage to either Roosevelt or the Court as a result of the Court-packing battle. By contrast, Solomon cited damage to the Court. And Shesol saw political damage to Roosevelt.

Shesol and Solomon seriously examine the question of whether the Court “switched” for legal or political reasons—even though Shesol regards that question as unanswerable and Solomon's answer cites both law and politics. But Simon does not even entertain the question. Regarding Hughes as the decisive figure, and believing that he never switched positions, Simon effectively rules out the question of why the Court switched. For Simon, the law-politics distinction did not merely vanish in 1937—it became virtually inconceivable. When the differences between Roosevelt and Hughes disappeared in 1937, the very possibility of a distinction between law and politics disappeared too—both in law and in historical analysis.

Unlike Solomon's and Shesol's conclusions, Simon's required him to rewrite history. His account, as noted earlier, rests on the premise that Hughes and Roosevelt agreed about the Constitution—when they did not. Simon claims that Hughes did not change his mind about the Commerce Clause in 1937 (but he did change his mind, at least if his opinions mean anything) and that Hughes demolished the direct-indirect distinction in 1914 (when Hughes in fact introduced that very distinction to constitutional law in 1935).

I have argued that Simon's book—like Solomon's and Shesol's—is well calibrated for the threat that has faced New Deal era jurisprudence since the 1980s. Simon's book, in particular, cannot be understood in any other way. Solomon and Shesol managed to combine historical accuracy—externalism—with non-externalist

conclusions favorable to the New Deal era in law. Simon does not. We can confidently regard a defense of the New Deal era as the driving force behind his book because nothing else explains Simon's conclusions.

Today, it is conceivable that the Supreme Court will revisit the 1937 constitutional revolution and, finding it to have been political, undo it. Federal authority—and perhaps all government authority—again seems to be in question on the Court. A dramatic demonstration came in *National Federation of Independent Business v. Sebelius*,<sup>61</sup> with a majority of the Justices concluding that the Affordable Care Act lay outside the bounds of federal power under the Commerce Clause. Moreover, the Act's identified constitutional flaw—subjecting an individual to federal power because of his or her inaction (the act of not purchasing health insurance)—sounded very much like an argument about liberty in general, and not just federal power.

What *FDR and Chief Justice Hughes* offers is a creation myth—one calculated, like other creation myths, to defend a cultural order through an account of its origins. Simon posits no specific act of creation, however. Instead, the tenets of New Deal era in law seem to have lived forever in the thoughts of Charles Evans Hughes. Simon's is the kind of creation myth in which a world springs full-blown from the mind of a creator—even if Simon's legal creator, Hughes, happened to have a political twin in Roosevelt.

Suppose it is the year 2020 and a conservative Supreme Court, in a six-to-three vote, embraces a restrictive, *Carter Coal*-like understanding of federal power. The President and a Congressional majority, being liberal, wonder whether threatening Court-packing might induce two Justices to change positions. Looking to 1937 for guidance, the President and members of Congress read Solomon's, Shesol's and Simon's books.

Under those circumstances, I believe, the niceties of academic debate would fade away and almost everyone would conclude that the political threat from Roosevelt produced the Court's doctrinal about-face. Readers would take that lesson from Solomon's book, I believe, even though Solomon claims that Roberts underwent a genuine constitutional conversion. Even if readers accepted Solomon's characterization, they might expect that a new Court-packing plan once again would produce genuine doctrinal conversions. Readers would take a similar lesson from Shesol, despite his argument that we can never know what actually influences a judge. Readers might accept not knowing exactly why Justices changed their minds, provided that the Justices followed the example of 1937 and did change their minds at the very moment when political pressure was applied.

What would readers in 2020 make of Simon's book? They would find it unhelpful, I believe. Creation myths can be elegant, like Simon's, and reveal the preoccupations of the culture that produced them. In other cultures, however, creation myths are only artifacts. They do not explain events, and they provide no guide for future actions.

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<sup>61</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (upholding most provisions of the Affordable Care Act on other grounds).

